

a

CHIEW SOON

v.

TAY TAI AUN

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[CIVIL SUIT NO. 24-4286-86]

29 NOVEMBER 1989

c

CIVIL PROCEDURE: Appeal by defendant against summary judgment granted to plaintiff - Claim for goods sold and delivered - Defence - Sum claimed is erroneous - That it was not the defendant who received goods - Whether person who allegedly received goods should have been included as a second defendant - Triable issue - Whether complete defence need be shown.

The plaintiff averred that the defendant and one Encik Selamat were at all material times customers of the plaintiff and were supplied goods by the plaintiff at their request.

d

The defendant in his amended statement of defence averred that the property in the goods never passed to the defendant and as such the defendant was not liable to pay the plaintiff.

The defendant further claimed that:

(a) the sum claimed by the plaintiff was erroneous.

(b) that it was one Encik Selamat who had signed for and acknowledged receipt of the goods.

e

The plaintiff in support of his claim exhibited five invoices and a statement of accounts to his affidavit. In his affidavit-in-reply, the defendant averred that he did not receive the goods at all and further denied signing or acknowledging receipts of any goods supplied by the plaintiff. Encik Selamat was not his partner in business, alleged the defendant.

*f***Held:**

[1] In respect of the five invoices, the goods were delivered to and received by Encik Selamat. Assuming the goods were received by Encik Selamat and the defendant, the plaintiff should have included Encik Selamat as a second defendant.

[2] This was not a plain and obvious case for summary judgment. There were triable issues, the facts of which, could only be decided at the trial.

g

[3] The defendant ought not to be shut out from defending unless it is very clear that he has no case in the action.

[4] A complete defence need not be shown. The defence set-up need only to show that there is a triable issue of question or that for some reason there ought to be a trial.

[Appeal allowed.]

*h***Cases referred to:**

Langdale & Anor. v. Danby [1982] 3 AER 129

Standard Chartered Bank v. Kentland Sendirian Berhad & Anor. [1989] 2 CLJ (Rep) 510

Alloy Automotive Sdn. Bhd. v. Perusahaan (Iron-field) Sdn. Bhd. [1986] CLJ (Rep) 45

Legislation referred to:*i*

Rules of the High Court 1980, O. 14 r. 1

Other source referred to:

The Supreme Court Practice, [1888] v. 1 p. 153

For the defendant - Mohd. Latip; M/s. Mohd. Latip & Associates

For the plaintiff - Abdul Razak Kassim; M/s. Abdul Razak & Yong

JUDGMENT**Zakaria Yatim J:**

This was an appeal by the defendant against the decision of the Senior Assistant Registrar given on 19 November 1987 allowing the plaintiff to enter final judgment pursuant to O. 14 r. 1 of the Rules of the High Court, 1980.

At the commencement of the hearing of the appeal, Encik Abdul Razak, Counsel for the plaintiff objected to the admissibility of two affidavits affirmed by the defendant on 18 November 1987 and on 28 July 1988 respectively on the ground that the affidavit contained fresh evidence. In support of his argument, Encik Abdul Razak cited a House of Lords decision in *Langdale & Anor. v. Danby* [1982] 3 AER 129. Encik Mohd. Latip, Counsel for the defendant, on the other hand relied on *The Supreme Court Practice* 1888, v. 1 p. 153.

On 16 November 1988, I ruled that the two affidavits were admissible for the purpose of the appeal. My ruling was based on two grounds. Firstly, an appeal from the Registrar to a Judge in chambers is dealt with by way of an actual rehearing. The Judge hearing the appeal treats the matter as though it is coming up for the first time. Secondly it is common practice for the Judge in chambers, subject to costs, to admit further or additional evidence by affidavit. *Standard Chartered Bank v. Kentland Sendirian Berhad & Anor.* [1989] 2 CLJ (Rep) 510.

Having made the ruling I then proceeded to hear the appeal on the merits.

The plaintiff was at all material times trading under the style and name of Chiew & company with a place of business at No. 117, Jalan SS21/37, Damansara Utama, Petaling Jaya, Selangor. In the amended statement of claim the plaintiff averred that the defendant and one Encik Selamat were at all material times customers of the plaintiff and were supplied goods by the plaintiff at their request. The plaintiff's claim was for the sum of RM26,108.46 being the outstanding amount due and owing for goods sold and delivered to the said customers at their request between 6 February 1985 and 25 February 1985. According to the statement of claim, by a letter dated 22 May 1986, issued to the defendant by the plaintiff, through its solicitors the plaintiff demanded payment of the said sum. The statement of claim went on to state that despite repeated demands, the defendant failed to settle the said sum or any part thereof.

The defendant in his amended statement of defence denied that the plaintiff supplied goods to him in the sum of RM26,108.46. The defendant averred that the property in the said goods never passed to the defendant and the defendant was not liable to pay the amount as stated in the statement of claim. In the alternative the defendant averred that the sum of RM26,108.46 claimed by the plaintiff was erroneous. The defendant further averred that it was one Encik Selamat who had signed for and acknowledged receipt of the said goods from the plaintiff, and the defendant's premises and/or cold room facilities was used by Encik Selamat to store the goods obtained from the plaintiff for onward delivery to the Ayer Keroh Zoo in Malacca under a contract entered into between Encik Selamat and the Government of Malaysia.

The plaintiff in support of his claim for RM26,108.46 against the defendant for goods sold and delivered for the period 6 February 1985 to 25 February 1985 exhibited five invoices and a statement of account to his affidavit affirmed on 13 July 1987. In the statement of account,

- a* the plaintiff included the five invoices plus one invoice dated 4 March 1985 for a sum of RM2,843.98. After deducting the amounts in the credit column, there was a balance of RM26,108.46. This amount included the amount in invoice No.7859 dated 14 March 1985, which was not exhibited to the said affidavit and which was not included in the statement of claim. It will be recalled that the plaintiff's claim was up to 25 February 1985. From the statement of account the plaintiff had claimed in excess by including an invoice not envisaged
- b* in the statement of claim.

- In his affidavit in reply affirmed on 18 November 1987, the defendant averred that he was not indebted to the plaintiff for any sum whatsoever because he did not receive any goods at all as stated in the plaintiff's invoices. He also denied signing or acknowledging receipts of any goods supplied by the plaintiff. According to the defendant, Encik Selamat who purchased goods which consisted of meat supplies from the plaintiff for delivery to the Ayer Keroh Zoo and Encik Selamat merely used the defendant's cold room facility in the defendant's premises for a fee RM150 per month. The defendant denied that Encik Selamat was his partner in business. The defendant exhibited to his partner in business. The defendant exhibited to his subsequent affidavit affirmed on 28 July 1988, his application in Borang A dated 4 February 1975 for the registration of his business. The form stated that his business name was "Sin Hiap Ann" which was a sole proprietorship. His business commenced from 4 February 1975. The name of the proprietor was the defendant's name and the form was signed by him in Chinese characters. The defendant's application as stated in Broang A was registered by the Registrar of Business on 25 February 1975.

- c*
- d*
- e* Encik Latip referred to the five invoices exhibited to the plaintiff's affidavit affirmed on 13 July 1987. All the five invoices were addressed to Mr. Teh and Encik Selamat. At the bottom of each invoice there is a signature but this signature is different from the signature of the defendant in Borang A. The defendant exhibited several invoices to his affidavit affirmed on 15 July 1988. These invoices were for the months of April, May and June and they were sent by the plaintiff to "Mr. Teh." At the bottom of each of the invoices appears his business name. Sin Hiap Ann and his signature is similar to that in Borang A.

- f* In my opinion it appears that in respect of the five invoices, the goods were delivered to and received by Encik Selamat. Assuming that the goods were received by both Encik Selamat and the defendant the plaintiff should have included Encik Selamat as a second defendant.

- g* This was not a plain and obvious case for summary judgment. There were triable issues of facts which could only be decided at the trial. The defendant ought not to be shut-out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set-up need only show there is triable issue of question or that for some reason there ought to be a trial. *Alloy Automotive Sdn. Bhd. v. Perusahaan (Iron-field) Sdn. Bhd.* [1986] CLJ (Rep) 45 at 57.

For the reasons stated above, I allowed the appeal with costs, and since the amount claimed was RM26,108.46 I ordered that the case be transferred to the Sessions Court for trial.

- h*

Also found at [1990] 1 CLJ 469

- i*